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November 23, 2020

Docket Supervisor
Arizona Department of Water Resources
1110 W. Washington St., Ste. 310
Phoenix, Arizona 85007

RE: Motion for Rehearing or Review

Dear Supervisor,

Enclosed are two *Motion for Rehearing or Review* on behalf of 1) **Baca Float #3 LLC** and 2) **Sopori 12,500 Investors LL and the Sopori Domestic Water Improvement District**. Please file the originals and return one conformed copy each to our office in the self-addressed, stamped envelopes.

Feel free to contact our office with any questions.

Very truly yours,



Tanya M. Ferreira
Legal Assistant

Enclosures

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9 *Attorneys for Baca Float #3 LLC*

10 **ARIZONA DEPARTMENT OF WATER RESOURCES**

11 **BEFORE THE DIRECTOR**

12 **IN THE MATTER OF THE**
13 **ADOPTION OF THE MANAGEMENT**
14 **PLAN FOR THE SANTA CRUZ**
15 **ACTIVE MANAGEMENT AREA FOR**
16 **THE FOURTH MANAGEMENT**
17 **PERIOD**

18 **MOTION FOR REHEARING**
19 **OR REVIEW**

20 Pursuant to A.R.S. § 45-114(C), Baca Float #3 LLC (“Baca Float”), through its
21 counsel, hereby files this Motion for Rehearing or Review of the Order of Adoption of the
22 Management Plan for the Santa Cruz Active Management Area for the Fourth Management
23 Period (“Motion for Rehearing or Review”). Baca Float respectfully requests that the
24 Director of the Arizona Department of Water Resources (“ADWR”) review and revise the
25 October 20th, 2020 Order of Adoption of the Management Plan for the Santa Cruz Active
26 Management Area for the Fourth Management Period (“Order of Adoption”) for the
27 following reasons: (1) ADWR does not expressly recognize that the Management Plan for
28 the Santa Cruz Active Management Area for the Fourth Management Period, dated October
20, 2020, (“SCAMA Fourth Management Plan”) will not affect or limit senior surface
water rights, as required by the Arizona Legislature in A.R.S. § 45-411.04 when it created
the Santa Cruz Active Management Area (“SCAMA”); (2) ADWR cannot impose Well
Spacing Criteria in SCAMA that affect or limit senior surface water rights pursuant to
A.R.S. § 45-411.04; (3) Riparian transpiration demands cannot be given preference over
senior surface water rights under the coordinated management approach required by A.R.S.

§ 45-411.04; and (4) SCAMA is currently maintaining safe-yield so no additional conservation requirements are necessary for the fourth management period.

I. ADWR Does Not Expressly Recognize that the SCAMA Fourth Management Plan Will Not Affect or Limit Senior Surface Water Rights as required by A.R.S. § 45-411.04 .

In 1994, when it created the SCAMA from the Tucson Active Management Area, the Arizona Legislature recognized the unique nature of the Upper Santa Cruz River as an international stream and its unique hydrology. A.R.S. § 45-411.04(A). As such, the legislature called for coordinated management of groundwater and surface water in the region. A.R.S. § 45-411.04(B). However, the legislature specifically recognized that, “While the coordinated management can include all naturally occurring waters within the basin, it is not the intent of any party in the [SCAMA] or this legislature **to modify or amend** in any way the fundamental laws and rights to surface water and groundwater pursuant to the laws of this state.” A.R.S. § 45-411.04(D) (emphasis added). Moreover, the legislature made it clear that,

It is the express intent of the legislature that the creation of the Santa Cruz active management area is **not to affect** the definition of, or rights to, the surface waters and the groundwaters within this state, **or to establish any precedent** that could be used in a court of law to **define, limit, or extend** the rights of this state or the United States of America over the surface waters and groundwaters found within this state **or to define or limit the legal distinction between surface water and groundwater** in this state. A.R.S. § 45-411.04(C) (emphasis added).

In the SCAMA Fourth Management Plan, however, ADWR does not reference the legislative intent expressed in A.R.S. § 45-411.04 and does not specifically state that the Plan will **not** affect surface water rights, including surface water pumped from wells, or “subflow.” Subflow is legally characterized as surface water under Arizona law, so the shallow wells in the Santa Cruz River and its tributaries, from which Baca Float withdraws water, pump appropriable surface water under A.R.S. §§ 45-101(9), 45-141(A). *See In re Gila River System*, 9 P.3d 1069, 198 Ariz. 330 (Ariz. 2000) (“*Gila IV*”).

1 The fundamental elements of a surface water right are: (1) the priority of senior
2 surface water users to take water before all junior users during times of insufficient supply
3 for all users, (2) the right to sever and transfer, and (3) the right to change the point of
4 diversion and type of use. To maintain such rights, beneficial and continuous use are
5 generally required. Baca Float holds some of the most senior surface water claims in the
6 SCAMA, as well as substantial groundwater rights under the 1980 Groundwater Code.
7 Baca Float is concerned that ADWR's approach to the management of surface and
8 groundwater rights under the SCAMA Fourth Management Plan will affect the continuing
9 use of its senior surface water rights.

10 While they are yet to be adjudicated, Baca Float's senior surface water rights have
11 been, and continue to be, supported by historical fact. Indeed, Baca Float holds surface
12 water rights that are appurtenant to land "within the boundaries of a land grant from the
13 United States Government to the heirs of Luis Maria Cabeza de Baca in 1860." *See* Finding
14 of Fact #2, Director's Findings of Fact, Conclusions of Law, Decision and Order re:
15 Certificate No. 36-42316, Rio Rico Properties Inc., ST-96-001 (TS-16) (May 16, 1996)
16 ("S&T Order") at 1. Baca Float's prior vested surface water rights along the Santa Cruz
17 River have priority dates tied to a perfected Spanish/Mexican land grant arising from the
18 Treaty of Córdoba, Aug. 24, 1821 (also colloquially referred to as the United States' Treaty
19 of 1821 with Spain), and the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922. In
20 1914, the United States Supreme Court upheld and confirmed the validity of this privately
21 held land grant more commonly known as Baca Float Number Three. *See Lane v. Watts*,
22 234 U.S. 525, 540 (1914).

23 In the late 1980s, Irrigation Grandfathered Rights ("IGFR") were also issued to Rio
24 Rico Properties, Baca Float's predecessor in interest. However, when those IGFRs were
25 issued, the Department recognized that "the withdrawals on which [the] application was
26 based were probably subflow of the Santa Cruz River." *See* Letter from Director Wesley
27 E. Steiner to Rio Rico Properties (December 24, 1984). On certain irrigated parcels within
28

1 Baca Float's overall farming operation, these IGFR rights overlay the historic surface water
2 rights. Thus, on certain parcels, the Department refers to these rights as "dual-filed"
3 because the surface water rights have not been finally adjudicated, and the Gila River
4 General Stream Adjudication Court has not made a final determination of the subflow zone
5 for the Santa Cruz River. *See* S&T Order at 3. Therefore, Baca Float requests that ADWR
6 expressly recognize in the SCAMA Fourth Management Plan that it will not affect or limit
7 senior surface water rights as required by A.R.S. § 45-411.04.

8 **II. ADWR Cannot Impose Well Spacing Criteria or Requirements in the SCAMA**
9 **that Affect or Limit Senior Surface Water Rights Pursuant to A.R.S. § 45-**
10 **411.04.**

11 ADWR's Well Spacing Requirements for SCAMA, set forth in Section 10.9 of the
12 Santa Cruz Fourth Management Plan, require that any person drilling a new well, a non-
13 exempt well, or a replacement well in a new location must submit a hydrologic study
14 demonstrating that withdrawals from the proposed well will not result in local water tables
15 experiencing a long-term decline. SCAMA Fourth Management Plan at 10-10. The
16 hydrologic study must evaluate projected declines in water levels, and ADWR may refuse
17 to issue a permit based on the study. *See* Section 10.8, Well Spacing Criteria, SCAMA
18 Fourth Management Plan at 10-8 to 10-9. In fact, ADWR states that "[i]f ... the
19 Department determines that a proposed well will have a negative effect on the
20 maintenance of local water table levels and safe-yield conditions, the Department may
21 refuse to issue the permit." SCAMA Fourth Management Plan at 10-9.

22 ADWR is required to include in the SCAMA Fourth Management Plan "criteria for
23 the location of new wells and replacement wells in new locations consistent with the
24 management goal of the active management area." A.R.S. § 45-567(A)(9). However,
25 ADWR **cannot** adopt Well Spacing Criteria or Requirements that modify or amend laws
26 relating to surface water nor affect or limit senior surface water rights pursuant to A.R.S.
27 § 45-411.04. Therefore, ADWR must clarify that the Well Spacing Requirements in the
28

1 SCAMA Fourth Management Plan will **not** be applied to deny a change in point of diversion
2 for a senior surface water right in order to protect water levels in wells of junior
3 appropriators or riparian transpiration demands, even if the senior appropriator is pumping
4 subflow from a well. As a result, Baca Float requests that ADWR clarify in the SCAMA
5 Fourth Management Plan that the Well Spacing Requirements set forth in Section 10-901
6 are **not** applicable to appropriable surface water rights, including wells withdrawing
7 subflow of the Santa Cruz River.¹

8 **III. Riparian Transpiration Cannot Be Given Preference Over Senior Surface**
9 **Water Rights under the Coordinated Management Approach Required by**
10 **A.R.S. § 45-411.04.**

11 Riparian transpiration demands are increasing and exceed all other demands
12 combined in the SCAMA. Ratcheting down conservation requirements on senior surface
13 water users who rely on wells pumping subflow in order to protect riparian demands
14 effectively gives a preference to riparian demands over senior surface water rights and is
15 inconsistent with the coordinated management approach required by A.R.S. § 45-411.04.
16 Indeed, riparian transpiration in SCAMA comprised 19,712 acre-feet per year in 2017,
17 which was an increase of 3,462 acre-feet since 2010 (more than the City of Nogales,
18 Arizona pumped in 2017). *See* Table 2-1, SCAMA Fourth Management Plan at p 2-16, and
19 Figure 3A-2, SCAMA Fourth Management Plan at 3-14. In contrast, all other water
20 demands in the SCAMA added together account for 17,203 acre-feet per year in 2017, or
21 2,509 acre-feet less than riparian transpiration demands. *See* Tables 3-1(A) and 3-1(B),
22 SCAMA Fourth Management Plan at 3-3 and 3-4. Thus, Baca Float requests that ADWR
23 acknowledge that coordinated management of wells in the SCAMA does not give ADWR
24 the authority to deny the rights of senior surface water users to change points of diversion
25 in order to protect increasing downstream riparian demands.

26
27
28 ¹ Baca Float reserves the right to challenge the Well Spacing Requirements set forth
in Section 10-901 if ADWR applies them to its senior surface water rights.

1 **IV. SCAMA Is Currently Maintaining Safe-Yield, so No Additional Conservation**
2 **Requirements Are Necessary in the Fourth Management Period.**

3 Safe-yield means “a long-term balance between the annual amount of groundwater
4 withdrawn in an active management area and the annual amount of natural and artificial
5 recharge in the active management area.” A.R.S. § 45-561. ADWR recognizes that “Since
6 1985, the use of water withdrawn from wells has fluctuated but has not shown a clear
7 increasing or decreasing pattern.” SCAMA Fourth Management Plan at 11-1. According
8 to Tables 3-1(A) and 3-1(B), municipal, exempt wells, industrial, and agricultural demands
9 in the SCAMA in 2017 are in the same range as they were in 1985. *See* Water Demands
10 and Supply, SCAMA Fourth Management Plan at pp. 3-3 and 3-4. Table 3-4 demonstrates
11 that total demand from all sectors was almost the same amount in 2015 as in 1985, and
12 water withdrawn from wells was less in 2015 than in 1985. *See* Water Demands and Supply,
13 SCAMA Fourth Management Plan at pp. 3-13. In addition, artificial recharge remains fairly
14 constant, including incidental agricultural recharge and effluent recharge. *See* Section 2.5.2
15 Underground Water Recharge and Discharge, SCAMA Fourth Management Plan at 2-13 to
16 2-17. Offsets to groundwater pumping, including natural and artificial recharge are
17 variable, but conservation requirements have little to no impact on natural variability in
18 water supply. Therefore, SCAMA maintains a long-term balance between withdrawals and
19 recharge and is in safe yield. So, no additional conservation requirements are necessary.
20 Therefore, Baca Float requests that ADWR exercise its discretion and decline to include
21 additional conservation requirements in the SCAMA Fourth Management Plan. *See*
22 ADWR Overview of Changes from the Third Management Plan (June 1, 2020).

23 **V. Conclusion.**

24 In sum, Baca Float requests that ADWR grant this Motion for Rehearing or Review,
25 review the Order of Adoption, and revise the SCAMA Fourth Management Plan in the
26 following ways: 1) to expressly state that it does not affect or limit senior surface water
27 rights; 2) to clarify that Well Spacing Criteria or Requirements will not affect or limit senior
28 surface water rights and will not be applied to deny a senior surface water user’s change in

1 point of diversion in order to protect downstream junior users or existing water levels; 3) to
2 clarify that coordinated management does not give riparian demands preference over senior
3 surface water rights; and 4) to decline to include additional conservation requirements for
4 the fourth management period because the SCAMA continues to maintain safe-yield as
5 required by statute.

6 DATED this 23rd day of November 2020.

7 TSL LAW GROUP, PLC

8
9 By: 

10 Lee A. Storey

11 Alexandra M. Arboleda

8096 N. 85th Way, Suite 105

Scottsdale, Arizona 85258

Attorneys for Baca Float #3 LLC

13 **CERTIFICATE OF SERVICE**

14 ORIGINAL of the foregoing mailed this 23rd day of November 2020 for filing with:

15 Docket Supervisor

16 Arizona Department of Water Resources

17 1110 W. Washington Street, Suite 310

18 Phoenix, Arizona 85007

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9 *Attorneys for Sopori 12,500 Investors LLC and the*
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21 Pursuant to A.R.S. § 45-114(C), Sopori 12,500 Investors LLC and the Sopori
22 Domestic Water Improvement District (“Sopori”), through its counsel, hereby files this
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24 Santa Cruz Active Management Area for the Fourth Management Period (“Motion for
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26 Department of Water Resources (“ADWR”) review and revise the October 20th, 2020
27 Order of Adoption of the Management Plan for the Santa Cruz Active Management Area
28 for the Fourth Management Period (“Order of Adoption”) for the following reasons: (1)
ADWR does not expressly recognize that the Management Plan for the Santa Cruz Active
Management Area for the Fourth Management Period, dated October 20, 2020, (“SCAMA
Fourth Management Plan”) will **not** affect or limit senior surface water rights, as required
by the Arizona Legislature in A.R.S. § 45-411.04 when it created the Santa Cruz Active
Management Area (“SCAMA”); (2) ADWR cannot impose Well Spacing Criteria in
SCAMA that affect or limit senior surface water rights pursuant to A.R.S. § 45-411.04;

(3) Riparian transpiration demands cannot be given preference over senior surface water rights under the coordinated management approach required by A.R.S. § 45-411.04; and
(4) SCAMA is currently maintaining safe-yield so no additional conservation requirements are necessary for the fourth management period.

I. ADWR Does Not Expressly Recognize that the SCAMA Fourth Management Plan Will Not Affect or Limit Senior Surface Water Rights as required by A.R.S. § 45-411.04.

In 1994, when it created the SCAMA from the Tucson Active Management Area, the Arizona Legislature recognized the unique nature of the Upper Santa Cruz River as an international stream and its unique hydrology. A.R.S. § 45-411.04(A). As such, the legislature called for coordinated management of groundwater and surface water in the region. A.R.S. § 45-411.04(B). However, the legislature specifically recognized that, “While the coordinated management can include all naturally occurring waters within the basin, it is not the intent of any party in the [SCAMA] or this legislature **to modify or amend** in any way the fundamental laws and rights to surface water and groundwater pursuant to the laws of this state.” A.R.S. § 45-411.04(D) (emphasis added). Moreover, the legislature made it clear that,

It is the express intent of the legislature that the creation of the Santa Cruz active management area is **not to affect** the definition of, or rights to, the surface waters and the groundwaters within this state, **or to establish any precedent** that could be used in a court of law to **define, limit, or extend** the rights of this state or the United States of America over the surface waters and groundwaters found within this state **or to define or limit the legal distinction between surface water and groundwater** in this state. A.R.S. § 45-411.04(C) (emphasis added).

In the SCAMA Fourth Management Plan, however, ADWR does not reference the legislative intent expressed in A.R.S. § 45-411.04 and does not specifically state that the Plan will **not** affect surface water rights, including surface water pumped from wells, or “subflow.” Subflow is legally characterized as surface water under Arizona law, so the shallow wells in the Santa Cruz River and its tributaries, from which Sopori withdraws

1 water, pump appropriable surface water under A.R.S. §§ 45-101(9), 45-141(A). *See In re*
2 *Gila River System*, 9 P.3d 1069, 198 Ariz. 330 (Ariz. 2000) (“*Gila IV*”).

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6 diversion and type of use. To maintain such rights, beneficial and continuous use are
7 generally required. Sopori holds some of the most senior surface water claims in the
8 SCAMA, as well as substantial groundwater rights under the 1980 Groundwater Code.
9 Sopori is concerned that ADWR’s approach to the management of surface and groundwater
10 rights under the SCAMA Fourth Management Plan will affect the continuing use of its
11 senior surface water rights. While they are yet to be adjudicated, Sopori’s senior surface water
12 rights have been, and continue to be, supported by historical fact. Therefore, Sopori requests that
13 ADWR expressly recognize in the SCAMA Fourth Management Plan that it will **not** affect
14 or limit senior surface water rights as required by A.R.S. § 45-411.04.

15 **II. ADWR Cannot Impose Well Spacing Criteria or Requirements in the SCAMA**
16 **that Affect or Limit Senior Surface Water Rights Pursuant to A.R.S. § 45-**
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18 ADWR’s Well Spacing Requirements for SCAMA, set forth in Section 10.9 of the
19 Santa Cruz Fourth Management Plan, require that any person drilling a new well, a non-
20 exempt well, or a replacement well in a new location must submit a hydrologic study
21 demonstrating that withdrawals from the proposed well will not result in local water tables
22 experiencing a long-term decline. SCAMA Fourth Management Plan at 10-10. The
23 hydrologic study must evaluate projected declines in water levels, and ADWR may refuse
24 to issue a permit based on the study. *See* Section 10.8, Well Spacing Criteria, SCAMA
25 Fourth Management Plan at 10-8 to 10-9. In fact, ADWR states that “[i]f ... the Department
26 determines that a proposed well will have a negative effect on the maintenance of local
27 water table levels and safe-yield conditions, the Department may refuse to issue the permit.”
28 SCAMA Fourth Management Plan at 10-9.

ADWR is required to include in the SCAMA Fourth Management Plan “criteria for the location of new wells and replacement wells in new locations consistent with the management goal of the active management area.” A.R.S. § 45-567(A)(9). However, ADWR **cannot** adopt Well Spacing Criteria or Requirements that modify or amend laws relating to surface water nor affect or limit senior surface water rights pursuant to A.R.S. § 45-411.04. Therefore, ADWR must clarify that the Well Spacing Requirements in the SCAMA Fourth Management Plan will **not** be applied to deny a change in point of diversion for a senior surface water right in order to protect water levels in wells of junior appropriators or riparian transpiration demands, even if the senior appropriator is pumping subflow from a well. As a result, Sopori requests that ADWR clarify in the SCAMA Fourth Management Plan that the Well Spacing Requirements set forth in Section 10-901 are **not** applicable to appropriable surface water rights, including wells withdrawing subflow of the Santa Cruz River.¹

III. Riparian Transpiration Cannot Be Given Preference Over Senior Surface Water Rights under the Coordinated Management Approach Required by A.R.S. § 45-411.04.

Riparian transpiration demands are increasing and exceed all other demands combined in the SCAMA. Ratcheting down conservation requirements on senior surface water users who rely on wells pumping subflow in order to protect riparian demands effectively gives a preference to riparian demands over senior surface water rights and is inconsistent with the coordinated management approach required by A.R.S. § 45-411.04. Indeed, riparian transpiration in SCAMA comprised 19,712 acre-feet per year in 2017, which was an increase of 3,462 acre-feet since 2010 (more than the City of Nogales, Arizona pumped in 2017). *See* Table 2-1, SCAMA Fourth Management Plan at p 2-16, and Figure 3A-2, SCAMA Fourth Management Plan at 3-14. In contrast, all other water demands in the SCAMA added together account for 17,203 acre-feet per year in 2017, or

¹ Sopori reserves the right to challenge the Well Spacing Requirements set forth in Section 10-901 if ADWR applies them to its senior surface water rights.

1 2,509 acre-feet less than riparian transpiration demands. *See* Tables 3-1(A) and 3-1(B),
2 SCAMA Fourth Management Plan at 3-3 and 3-4. Thus, Sopori requests that ADWR
3 acknowledge that coordinated management of wells in the SCAMA does not give ADWR
4 the authority to deny the rights of senior surface water users to change points of diversion
5 in order to protect increasing downstream riparian demands.

6 **IV. SCAMA Is Currently Maintaining Safe-Yield, so No Additional Conservation**
7 **Requirements Are Necessary in the Fourth Management Period.**

8 Safe-yield means “a long-term balance between the annual amount of groundwater
9 withdrawn in an active management area and the annual amount of natural and artificial
10 recharge in the active management area.” A.R.S. § 45-561. ADWR recognizes that “Since
11 1985, the use of water withdrawn from wells has fluctuated but has not shown a clear
12 increasing or decreasing pattern.” SCAMA Fourth Management Plan at 11-1. According
13 to Tables 3-1(A) and 3-1(B), municipal, exempt wells, industrial, and agricultural demands
14 in the SCAMA in 2017 are in the same range as they were in 1985. *See* Water Demands
15 and Supply, SCAMA Fourth Management Plan at pp. 3-3 and 3-4. Table 3-4 demonstrates
16 that total demand from all sectors was almost the same amount in 2015 as in 1985, and
17 water withdrawn from wells was less in 2015 than in 1985. *See* Water Demands and Supply,
18 SCAMA Fourth Management Plan at pp. 3-13. In addition, artificial recharge remains fairly
19 constant, including incidental agricultural recharge and effluent recharge. *See* Section 2.5.2
20 Underground Water Recharge and Discharge, SCAMA Fourth Management Plan at 2-13 to
21 2-17. Offsets to groundwater pumping, including natural and artificial recharge are
22 variable, but conservation requirements have little to no impact on natural variability in
23 water supply. Therefore, SCAMA maintains a long-term balance between withdrawals and
24 recharge and is in safe yield. So, no additional conservation requirements are necessary.
25 Therefore, Sopori requests that ADWR exercise its discretion and decline to include
26 additional conservation requirements in the SCAMA Fourth Management Plan. *See*
27 ADWR Overview of Changes from the Third Management Plan (June 1, 2020).

1 **V. Conclusion.**

2 In sum, Sopori requests that ADWR grant this Motion for Rehearing or Review,
3 review the Order of Adoption, and revise the SCAMA Fourth Management Plan in the
4 following ways: 1) to expressly state that it does not affect or limit senior surface water
5 rights; 2) to clarify that Well Spacing Criteria or Requirements will not affect or limit senior
6 surface water rights and will not be applied to deny a senior surface water user's change in
7 point of diversion in order to protect downstream junior users or existing water levels; 3) to
8 clarify that coordinated management does not give riparian demands preference over senior
9 surface water rights; and 4) to decline to include additional conservation requirements for
10 the fourth management period because the SCAMA continues to maintain safe-yield as
11 required by statute.

12 DATED this 23rd day of November 2020.

13 TSL LAW GROUP, PLC

14 By: 

15 Lee A. Storey

16 Alexandra M. Arboleda

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18 Scottsdale, Arizona 85258

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